

EPA REGION 2's PROGRAM REVIEW
OF THE
NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION'S PROGRAM RELATING
TO
AIR SIGNIFICANT VIOLATORS

JULY 8, 1998

FINAL REPORT

TABLE OF CONTENTS

	<u>Page</u>
<u>FOREWARD</u>	ii
 <u>INTRODUCTION</u>	
Purpose of NJDEP Program Review.....	1
NJDEP Program Review Action Plan.....	1
Methodology of NJDEP Program Review.....	1
Table 1 - NJDEP Files Targeted and Files Reviewed.....	3 NJDEP
Program Review and the PADEP Audit.....	3
SV/T&A Policy.....	4
 <u>FINDINGS</u>	
Table 2 - Administrative Orders and Notices of Violation Reviewed.....	5
Table 3 - Identification of Significant Violators.....	7
Table 4 - Violations of Federally Enforceable Regulations.....	8
Reporting of SV Violations To EPA.....	8
Responding to and Addressing SV Violations.....	9
Table 5- Timeliness of Addressing Action(NJDEP).....	10
Impacts on Timeliness.....	10
Assessment of Penalties.....	11
Table 6 - Timeliness of Addressing Actions (NJDEP v.s.National Average).....	12
 <u>CONCLUSIONS</u>	13
 <u>RECOMMENDATIONS</u>	
Reporting of SV Violations to EPA.....	13
Addressing SV Violations.....	14
Assessment of Penalties for SV Violation.....	14
 <u>FOLLOW-UP ACTIVITIES</u>	
NJDEP Improvements.....	15
Next Steps.....	16
 <u>ATTACHMENT</u>	
Random Selection of Files to Be Reviewed	

FORWARD

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INTRODUCTION

PURPOSE OF NJDEP PROGRAM REVIEW

The Environmental Protection Agency (EPA) Region 2's review of the New Jersey Department of Environmental Protection (NJDEP) air enforcement program for significant violators (SV) was conducted to:

Determine whether NJDEP identified SVs in accordance with EPA's Timely and Appropriate Policy (SV/T&A Policy)

Determine whether NJDEP reported SV violations to EPA;

Obtain an overall perspective of how well the NJDEP's air compliance/enforcement program is operating with respect to addressing SV violations.

Region 2's review of the NJDEP program was intended to evaluate the state's SV identification and violation reporting and was encouraged by EPA Headquarters. This report follows a recent audit performed by the Office of the Inspector General (IG) of the Pennsylvania Department of Environmental Protection (PADEP) air enforcement program. Region 2 has already completed a review of the New York State Department of Environmental Conservation.

NJDEP PROGRAM REVIEW ACTION PLAN

- 1) Identify the Purpose of the Program Review
- 2) Gather Background Information on NJDEP Air Enforcement Program
- 3) Develop Methodology
- 4) Meet with NJDEP Personnel to Discuss Methodology and Action Plan
- 5) Perform Program Review
- 6) Discuss Raw Data from Program Review with NJDEP Personnel
- 7) Finalize Report and Supporting Documentation

METHODOLOGY OF NJDEP PROGRAM REVIEW

Timeframe of Program Review

Appropriate documents for state fiscal years (SFY) 1995 and SFY 1996 were reviewed. As necessary, documents prior to and/or after the timeframe were also reviewed. This was essential to obtain historical information, such as how long problems persisted and the results of previous inspections. Likewise, information after SFY 96 was necessary to determine whether the state took timely and appropriate action (T&A.)

Selection of NJDEP Regional Offices which will participate in the Program Review

NJDEP maintains four Regional Offices throughout New Jersey. Appropriate documents at NJDEP's Southern and Metro Regional Offices were reviewed. These regions represent one mid-size office and one large office.

File Review

Enforcement actions and source files listed below were reviewed to determine whether they contain SVs and whether SV violations were reported to EPA, and to determine whether the violations were handled in accordance with EPA's SV/T&A Policy. Once the initial violation was identified in the Administrative Order, Notice of Violation, or source file it was tracked to determine whether additional enforcement actions were taken. For example, if the facility were issued a Notice of Violation it was further reviewed to determine whether an Administrative Order was also issued for that particular violation. Additionally, if more than one violation is indicated in a given Administrative Order or Notice of Violation, each violation was evaluated to determine if it met the SV definition and whether it conformed with the guidelines stated in the SV/T&A policy. Enforcement actions were randomly selected for review using the procedures listed in the attachment to this report.

1) Randomly Selected 48 Administrative Orders issued by NJDEP to major sources for SFY 1995. *(18 files in the Southern Regional Office and 30 files in the Metro Regional Office.)*

2) Randomly Selected 48 Notices of Violation issued by NJDEP to major sources for SFY 1996. *(18 files in the Southern Regional Office and 30 files in the Metro Regional Office.)*

Note: A total of 96 enforcement actions issued to major sources were targeted for review. However, in the Southern Regional Office one enforcement action (SFY 1995 Administrative Order) was removed since it was determined to be a minor source. Additionally, in the Metro Regional Office, three actions (one SFY 1995 Administrative Order and two SFY 1996 Notices of Violation) were removed because of the unavailability of information. Thus, a total of 92 actions were reviewed.

Table 1 - NJDEP FILES TARGETED AND FILES REVIEWED

	Southern Targeted	Southern Actual	Metro Targeted	Metro Actual	Metro and Southern Total Actual
SFY95 Administrative Orders	18	17	30	29	46
SFY96 Notices of Violation	18	18	30	28	46
Total	36	35	60	57	92

As indicated in Table 1, 48 SFY 1995 Administrative Orders, (18 files in the Southern Regional Office and 30 files in the Metro Regional Office), were targeted. However, 46 were actually reviewed (17 files in the Southern Regional Office and 29 files in the Metro Regional Office.)

Additionally, 48 SFY 1996 Notices of Violation, (18 files in the Southern Regional Office and 30 files in the Metro Regional Office), were targeted. However, 46 were actually reviewed (18 files in the Southern Regional Office and 28 files in the Metro Regional Office.) Thus, the total of 92 enforcement actions reviewed included 46 Administrative Orders and 46 Notices of Violation.

3) Randomly Selected and Reviewed 12 files for major sources which were inspected by NJDEP and found to be in compliance (i.e., no Notice of Violation or Administrative Action Issued) (4 in Southern Regional Office and 8 in Metro Regional Office)

4) Randomly Selected and Reviewed 12 files for minor sources which were inspected by NJDEP(4 in Southern Regional Office and 8 in Metro Regional Office)

NJDEP PROGRAM REVIEW AND THE PADEP AUDIT

1) In Pennsylvania, the EPA IG audited the population of potential SVs by examining every Notice of Violation issued by PADEP and sent to EPA Region 3. Since NJDEP did not have authority to issue Notices of Violation until SFY 1996, our review focused on Administrative Orders in SFY 1995. In SFY 1995, NJDEP issued 232 Administrative orders to major sources and we selected a random sample of 46 from those issued by the Southern and Metro Offices to review.

In SFY 1996, NJDEP obtained the authority to issue Notices of Violation when the Fast Track Compliance Law was passed and issued 508 to major sources. We selected a random sample of 46

from those issued by the Southern and Metro Offices to review. In addition, we also reviewed 12 files for major sources inspected during SFY 1995 or SFY 1996 for which no Notice of Violation or Administrative Order was issued.

2) In Pennsylvania, the EPA IG did not look at minor sources but focused on Notices of Violation issued to major sources. In New Jersey, EPA's review also primarily focused on major source files. However, we elected to review 12¹ minor source files to determine whether any of those sources were in violation of applicable regulations and to evaluate whether any of the violations would qualify them to be considered SVs.

3) In Pennsylvania, the EPA IG focused on whether or not SVs were identified and the violations were reported to EPA. In NJ, EPA's review also dealt with whether or not SVs were identified and violations were reported to EPA. Additionally, EPA Region 2 examined whether SV violations were handled in a timely and appropriate manner.

4) In Pennsylvania, the EPA IG spent five months surveying EPA Region 3 and PADEP procedures and an additional five months conducting the file audit. In NJ, EPA spent four weeks surveying NJDEP and approximately two weeks conducting the review.²

5) In Pennsylvania, the EPA IG audit examined actions taken in one fiscal year. In NJ, EPA's review covered actions in two state fiscal years in order to assess NJDEP's record in identifying and responding to SVs over time.

EPA'S SV/T&A POLICY

This report is based on the SV definitions in EPA's SV/T&A Policy. The policy applies to all "major (as defined by the Clean Air Act Amendments) stationary sources of air pollution which are in violation of a Federally-enforceable regulation." The SV/T&A Policy was designed to foster the development of a more complete and accurate compliance picture and sets the framework for the relationship between Federal, State and Local air pollution control agencies. The SV/T&A Policy requires these agencies

¹ During the data verification process it was determined that one minor source had been improperly characterized as major. Hence, 13 minor source files were reviewed.

² The EPA IG audit team consisted of two auditors and one audit manager from the IG's office. There was also limited technical assistance provided by 2 engineers from EPA Region V, and occasional assistance from three people in the Region 3 IG's office. EPA Region 2's review team in New Jersey consisted of four staff people conducting the review and two managers overseeing the effort.

track SVs and set “enforcement timeliness goals that environmental regulatory agencies aim to meet. According to the Policy, “A rapid response including appropriate penalties to violations is crucial for maintaining credible deterrence in the regulated community.”

FINDINGS

Table 2--ADMINISTRATIVE ORDERS AND NOTICES OF VIOLATION REVIEWED

Enforcement Actions (SFY 1995 Administrative Orders or SFY 1996 Notices of Violation)			
	Southern	Metro	Total
Number of Enforcement Actions Reviewed	35	57	92 ³
Number of Different Facilities which Received Enforcement Actions	30	44	74
Number of Facilities that Received a Single Enforcement Action	23	34	57
Number of Facilities that Received Multiple Enforcement Actions	7	10	17

Summary of EPA Region 2's Review of Administrative Orders and Notices of Violation issued by NJDEP in SFY 1995 or 1996 to major sources for FY.

As Table #2 indicates, EPA Region 2 reviewed a total of 92 enforcement actions issued to major sources by NJDEP’s Southern and Metro Regional Offices for SFY’s 1995 or 1996. ⁴ Based on EPA Region 2's request, NJDEP compiled a list of all Administrative Orders issued to major facilities in SFY 1995 and provided it to EPA Region 2. The list contained a log number, violator name and location, subchapter violated, and the violation determination date. Based on the log number EPA was able to ascertain which NJDEP Regional Office had issued the Administrative Order. EPA Region 2 then

³ A total of 96 enforcement actions issued to major sources were targeted for review. However, in the Southern Regional Office one enforcement action was removed as it was actually a minor source. Additionally, in the Metro Regional Office, three enforcement actions were removed because of the unavailability of information.

⁴ As stated previously, once the initial violation was identified in the Administrative Order, Notice of Violation or source file, it was tracked to determine whether additional enforcement actions were taken. For example, if the facility were issued a Notice of Violation, the reviewers attempted to determine whether an Administrative Order was also issued for that particular violation.

Therefore, more enforcement actions were actual reviewed then those randomly selected in the audit.

selected a random sample of Administrative Orders for review. EPA Region 2 selected a random sample of the Notices of Violations issued by NJDEP in SFY 1996 from a binder which contained copies of all such actions issued by NJDEP. The binder was kept at NJDEP headquarters for tracking purposes and was divided into sections based on the NJDEP Regional Office which initiated the action. The Notices of Violation included the facility name and address, subchapter violated, and the date of issuance. The exact selection process is included in the attachment to this report.

In some instances, since the selection of the enforcement actions for review was random, more than one of the enforcement actions reviewed related to the same facility. No effort was made to eliminate multiple enforcement actions issued to the same facility from our review. On this basis a total of 92 enforcement actions were randomly selected and were found to be issued to 74 different major sources. Of the 74 major sources which received enforcement actions, 17 received multiple enforcement actions while 57 received only one action.

Major sources inspected by NJDEP and found in compliance (i.e., no Notice of Violation or Administrative Action Issued)

EPA Region 2 reviewed 12 files for major sources which NJDEP inspected and determined to be in compliance (i.e., no Notice of Violation or Administrative Action Issued) in order to make our determination if any were significant violators. EPA Region 2 randomly selected the facilities based on lists of inspections conducted by NJDEP in SFY 1995 and SFY 1996. Once the facilities were randomly selected, EPA Region 2 determined whether or not inspectors had found violations at these facilities but not issued any enforcement action. EPA Region 2 reviewed these files and found no such instances.

Minor sources inspected by NJDEP.

EPA Region 2 reviewed files for 13 minor sources which were inspected during SFY 95 or SFY 96 to determine if any had violations which were not addressed through enforcement actions. No such instances were found among these files.

Table 3--IDENTIFICATION OF SIGNIFICANT VIOLATORS

Significant Violators (SVs)			
	Southern	Metro	Total
Significant Violators (Number of facilities which had at least one federally enforceable violation)	16	27	43
Number of Facilities which were not Significant Violators (Did not have at least one federally enforceable violation)	14	17	31
Number of SVs with one federally enforceable violation	13	22	35
Number of SVs with multiple violations (Facility which had more than one federally enforceable violation)	3	5	8
Total number of violations at SVs with multiple violations	7	15	22
Total Number of SV Violations	20	37	57

IDENTIFICATION OF SIGNIFICANT VIOLATORS

Of the 74 facilities reviewed by EPA Region 2 that received enforcement actions, 43 were identified as having at least one federally enforceable violation thereby making it an SV. Of these 43 facilities, 35

were identified as having one federally enforceable violation while 8 had multiple federally enforceable violations. In all, the 43 facilities had a total of 57 SV violations.⁵

Table 4 - VIOLATIONS OF FEDERALLY ENFORCEABLE REGULATIONS

	NJDEP Region		TOTAL
	Southern	Metro	
Total Number of SV Violations	20	37	57
SV Violations reported to EPA in SFY 95/96	11	33	44
SV Violations not reported to EPA in SFY 95/96	9	4	13
SV Violations reported to EPA which include all necessary information for EPA to raise the "SV FLAG" in its Database	11	27	38
SV Violations reported to EPA which DID NOT include all necessary information for EPA to raise the "SV Flag" in its Database	0	6	6
Statistics on SV Violations Found During the EPA Region 2 File Review			
SV Violations addressed under SV/T&A Policy by state	16	34	50
# addressed in timely fashion	8	17	25
# assessed penalties	16	34	50
SV Violations unaddressed under SV/T&A Policy by state	4	3	7
In compliance without assessed penalties	4	3	7
Out of Compliance	0	0	0

Reporting SV Violations To EPA

⁵ One Administrative Consent Order (ACO) reviewed contained three violations that are included in the 57 mentioned. In addition, ACO covered 13 AOs which had been issued to the same facility from 1986 until 1991. These 13 AOs contained 9 violations that are considered "significant." However, since these violations were addressed by AOs that were issued prior to the timeframe of the audit, they are not included in the 57. All 9 violations were reported and addressed within 150 days from the time they were discovered by NJDEP.

According to the SV/T&A Policy, the “Finding Agency detects violation and enters it into Airs Facility Subsystem (AFS).” Hence, when the State Agency discovers a SV violation it is responsible for entering the requisite information into the AFS system. The information includes, but is not limited to, date of inspection, date that violation is determined to exist, Notice of Violation issuance date, and dates of enforcement actions taken. AFS is the compliance database which is used by regulators to track SVs and analyze the time that elapses between discovery of a violation and issuance of an addressing action. Once the information is entered into the AFS system by the “finding agency”, the EPA Regional Office (Region 2) will “flag” those violations where it agrees that the SV definition is met. The SV “flag” is a data field in AFS which indicates that a violation is a SV. Information on SV violations can be pulled from AFS using this field and the “day zero.” The “flag” must be accurately maintained in order to ensure that the data, which is shared by other enforcement offices within EPA and the States, correctly reflects the SV status for all sources subject to the SV/T&A Policy.

During the timeframe examined in the program review, NJDEP did not have the expertise to enter SV information into the AFS database. EPA Region 2 agreed to assist NJDEP in entering such information until the state had restored its capability. An examination of the AIRs database indicated that 44 of the 57 SV violations examined during this program review were reported by NJDEP to EPA and entered into the system. However 13 SVs were not reported to EPA. Of the 13 SV violations that were not entered, 7 were for violations that NJDEP handled under its Fast Track Compliance Law. All 7 were issued Notices of Violation and returned to compliance within 50 days. The remaining 6 violations that were not reported to EPA were addressed by NJDEP, although none of the 6 were addressed within 150 days.

In addition, 6 of the 44 SV violations that were reported to EPA Region 2 by NJDEP did not contain the necessary information for EPA to identify, enter, or “Flag” the SVs. As a result, those violations were not identified or tracked as SV violations in the database. Thus, the reporting rate for this period was 67% (38 of 57.)

EPA has conducted several training session for NJDEP to enhance their AIRs capabilities and facilitate their ability to enter the data.

Responding to and Addressing SV Violations

According to the SV/T&A Policy, “The clock starts (i.e., day zero) no later than 30 days after the discovering agency first receives information concerning a federally enforceable violation concerning a major source (e.g., date of inspection, stack test or continuous emission monitoring system report). If, during this 30-day period, the enforcement agency decides that additional monitoring or analysis is required to determine or confirm the violation, the clock does not start until the earlier of the date of receipt of such additional data, or on the 90th day after the violation was initially discovered.” Once the determination or confirmation is made (day zero) the finding agency has 45 days to issue a *Notice of*

*Violation or a Finding of Violation.*⁶ The purpose of these enforcement actions is to promptly notify the facility of its violation so that corrective actions can begin as soon as possible.

The policy also states that by day 150 from the “day zero” the violation must be “addressed.” A source is only considered “addressed” if one of the following actions that impose a compliance schedule or require immediate compliance have been taken: a notice of non-compliance that includes a penalty issued; an EPA civil action is referred to the Department of Justice (DOJ); a Clean Air Act Section 113(a) or Section 167 order is issued; a CAA 113 (d) complaint is filed; a EPA criminal referral is made to DOJ; a consent decree or consent agreement is signed; a State civil action is referred to the AG; or a State administrative order is issued.

Response to SV Violations

NJDEP did not (have state authority to) issue Notices of Violation until SFY 1996. In SFY 1995, the initial enforcement action taken by NJDEP was an Administrative Order which served the function of responding to and “addressing” in the same instance. In SFY 1995, 4 of 32 violations (12.5%) received their first official action (an Administrative Order) within the 45 days prescribed by the SV/T&A Policy. This rate, though low, is not surprising given the amount of effort usually necessary to issue an Administrative Order. In SFY 1996, when NJDEP gained the authority to issue Notices of Violation, 22 of 25 violations (88.0%) received their first official action (a Notice of Violation) within the 45 days prescribed by the SV/T&A Policy.

Addressing SV Violations

In total, 57 SV violations were identified in EPA’s program review of NJDEP for SFY 95 and SFY 96. Of the 57 SV violations identified, 50 were ultimately addressed by NJDEP (88.0%). Of these, 25 were addressed within 150 days (43.9%) as prescribed by the SV/T&A Policy. The 7 violations that were not “addressed” in accordance with the SV/T&A Policy did receive a Notice of Violation from NJDEP. All 7 SVs returned to compliance within 50 days. In fact, six of the 7 SV violations returned to compliance within 30 days or less.

Table 5 --NJDEP TIMELINESS OF ADDRESSING ACTION

SVs ADDRESSED

SVs UNADDRESSED

⁶ On this basis, NJDEP identified the need for the additional data and time for 20 of the 57 SV violations identified during the program review.

	SV Violations Addressed within 150 Days	SV Violations Addressed with 151-365 Days	SV Violations Addressed over 365 Days	SV Violation Unaddressed 151-365 Days	SV Violations Unaddressed over 365 Days	Total
SFY 95 SV Violations Identified During EPA Review of NJDEP (Raw Numbers)	56.2% (18)	41.0% (13)	3.1% (1)	0% (0)	0% (0)	100% (32)
SFY 96 SV Violations Identified During EPA Review of NJDEP (Raw Numbers)	28% (7)	24% (6)	20% (5)	0% (0)	28% (7)	100% (25)

Table 4 is a comparison of the NJ timeliness of addressing SV Violations for SFY 95 and SFY 96. In SFY 1995, NJDEP addressed 56.2% of the SV violations identified during the program review within 150 days, 41.0% of the SV violations identified during the program review within 151- 365 days, and only one SV violation identified was addressed in over 365 days.

In SFY 1996, NJDEP addressed 28.0% of the SV violations identified during the program review within 150 days. These statistics would have been better if NJDEP recognized the 7 violations handled under the Fast Track Law as SVs and handled them in accordance with the SV/T&A policy. In that case, the SFY 95 and SFY 96 are similar.

Impacts on Timeliness

Processing of Stack Test Results

Of the 57 SV violations identified in the program review, 6 involved stack test results. Of the 6 that involved stack test results, 4 were not addressed within 150 days. Stack test raw data and summary findings are submitted by the company to the Bureau of Technical Services (BTS) at NJDEP. BTS would analyze the raw data and summary findings and provide the responsible NJDEP Regional Office with a compliance determination. According to the SV/T&A Policy, the clock starts (day zero) 30 days after the finding agency first receives information regarding a violation. Thus, the SV/T&A Policy clock started once BTS received the raw data and summary findings from the company. However, it is important to note that once the NJDEP Regional Office received the data from BTS, the action was handled expeditiously.

It was apparent from EPA's review that BTS did not provide the enforcement offices of NJDEP with the stack test results in a timely fashion in SFY 1995. NJDEP recognized that the process needed to be streamlined to ensure enforcement takes place in a timely manner and made changes prior to EPA's audit. NJDEP changed the procedure in SFY 1996 and now requires facilities to certify if they were out of compliance to both BTS and the Regional Office responsible for enforcement. This allows the Regional Office to prioritize BTS reviews and promptly issue a Notice of Violation.

Affirmative Defense

Of the 57 SV violations identified during the audit, 50 were “addressed” by NJDEP in accordance with EPA’s SV/T&A policy. Of the 50 that were addressed, 25 were handled within the SV/T&A Policy timeframe and 25 were not. It is important to note that 10 of the 25 SV violations (40.0%) that were addressed after day 150 involved a facility claiming an affirmative defense. This provision allows facilities which meet certain criteria spelled out in NJ’s law to assert an affirmative defense and, if granted by NJDEP, the facility would be absolved of any penalty.⁷ According to NJDEP, it is obligated to investigate affirmative defense assertions which, if denied, could cause the “addressing action” to be issued beyond 150 days.

Assessment of Penalties

EPA Region 2’s review of NJDEP focused on whether or not penalties had been assessed. We have not attempted, at this time, to characterize whether the penalties assessed were appropriate. Of the 57 SV violations identified during EPA’s review of NJDEP, 50 (88.0%) were addressed with penalties. A total of 7 violations were not assessed penalties although they were issued Notices of Violation. These occurred in SFY 1996. The reason stated by NJDEP for not assessing penalties for the 7 was the passage of the of New Jersey’s P.L 1995 c, 296, commonly know as the Fast Track Compliance Law. The purpose of the law is to designate through rulemaking certain types and categories of violations of environmental requirements as minor violations or non-minor violations. Under the law, any person responsible for a minor violation is afforded a period of time to correct the violation before being subject to a penalty. EPA is concerned that violations which are considered significant under EPA’s SV/T&A Policy and which in the past were addressed by penalties are not being treated as such because of NJ’s Fast Track Law. After further review, NJDEP has agreed that 5 of the 7 violations were significant under EPA’s SV/T&A policy and should have been handled in accordance with the policy.

New Jersey has expressed concerns with certain aspects of EPA’s SV/T&A policy. Specifically, New Jersey is concerned that some violations it would consider **Aminor@** (e.g., under the New Jersey Fast Track Compliance Law), might under some circumstances be considered **Asignificant@** under EPA’s SV/T&A policy. EPA’s policy is currently under review for possible revisions which may help address these concerns. EPA’s view is that until such revisions are finalized, the current SV/T&A policy is applicable and should be adhered to.

Table 6 --TIMELINESS OF ADDRESSING ACTION
NJDEP V.S. NATIONAL AVERAGE-

SVs ADDRESSED

SVs UNADDRESSED

⁷ Four additional facilities reviewed were granted an affirmative defense and thus were not in violation. As such, they were not counted among the 57 SV violations.

	SV Violations Addressed within 150 Days	SV Violations Addressed with 151-365 Days	SV Violations Addressed over 365 Days	SV Violation Unaddressed 151-365 Days	SV Violations Unaddressed over 365 Days	Total
SFY 95 SV Violations Identified During EPA Review of NJDEP (Raw Numbers)	56.2% (18)	41.0% (13)	3.1% (1)	0% (0)	0% (0)	100% (32)
SFY95 Timeliness Trend National Percentages (Raw Numbers)	EPA HAS NOT COMPILED INFORMATION ON THE NATIONAL TRENDS FOR THIS YEAR					
SFY 96 SV Violations Identified During EPA Review of NJDEP (Raw Numbers)	28% (7)	24% (6)	20% (5)	0% (0)	28% (7)	100% (25)
1996 SV Timeliness Trend National Percentages (Raw Numbers)	25.6% (721)	6.9% (197)	7.8% (222)	27.4% (774)	32.0% (901)	100% (2815)

Table 5 is a comparison of the NJ timeliness of addressing SV Violations versus the national timeliness. However, national SV timeliness information is not readily available for 1995. If it is presumed that the national data for 1996 is similar to that of 1995, a comparison of results for both years of the NJDEP program review can be made. In SFY 1995, NJDEP addressed 56.2% of the SV violations identified during the program review within 150 days, 41.0% of the SV violations identified during the program review within 151- 365 days, and only one SV violation identified was addressed in over 365 days.

In SFY 1996, NJDEP addressed 28.0% of the SV violations identified during the program review within 150 days. Nationally in 1996, 25.6% of the SV violations were addressed within 150 days. Additionally, NJDEP addressed 24.0% of the SV violations identified during the program review within 151 - 365 days compared to 6.9% which were addressed within that time period nationally. Moreover, 28.0% of the NJ SV violations identified remained unaddressed over 365 days, while the national average for SV violations unaddressed over 365 days is 32.0%. Overall, in SFY 1996 NJDEP addressed 72% of the violations while only 41% were addressed nationally. While not echoing the SV/T&A Policy and seemingly not as good as the 1995 performance, NJDEP's timeliness is better than the national average during this time period. These statistics would have been better if NJDEP recognized the 7 violations handled under the Fast Track Law as SVs and handled them in accordance with the SV/T&A policy. In that case, the SFY 95 and SFY 96 are similar.

CONCLUSIONS

NJDEP has procedures in place to identify SVs and those procedures were applied to violations discovered during the period of review.

Reporting of SVs to EPA is achieved by entering the inspection and violation determination into the AIRS database. For inspections and violations determined in SFY 1995 and SFY 1996, EPA Region 2 staff entered the data on behalf of NJDEP because NJ had lost its in-house expertise.

In SFY 95, NJDEP's Notices of Violation were timely in only 12.5% of the cases. In SFY 1996, the timely rate increased to 88.0% of the cases. This change is attributable primarily to the state's use of Notices of Violation as the initial response action instead of an Administrative Order as previously used. Additionally, NJDEP's addressing action was timely (within 150 days) in 56.2% in FY95 and 28.0% in FY96 of the cases.

In 50 of 57 cases New Jersey's response was appropriate in accordance with the SV/T&A Policy (i.e., they used the proper formal enforcement action with a penalty). In seven cases, NJ did not take a formal action because it was determined that the violation was "minor" under provisions of the New Jersey's Fast Track Compliance Law. No determination was made by EPA as to the adequacy of the penalties.

When compared to other states, NJ has traditionally operated a high quality enforcement program. However, technical difficulties and lack of expertise prevented NJDEP from entering the requisite SV information into the database. In addition, more study would need to be made to determine whether or not the state's implementation of the Fast Track Compliance Law conflict with the SV/T&A Policy.

RECOMMENDATIONS

REPORTING OF SV VIOLATIONS TO EPA

EPA Region 2 determined that 44 of the 57 SV violations reviewed by EPA Region 2 were entered into the AIRs database. However, as was noted in the findings section, for 6 of the SV violations, NJDEP did not provide all of the information so that EPA could identify or "flag" the SV. NJDEP will need to supplement its data entry to ensure that adequate and timely information is entered into the database so that EPA can "flag" the SV violations. Specifically, NJDEP must enter the requisite dates associated with a SV violation including the "day zero." EPA will work with NJDEP to ensure the proper elements are entered by NJDEP for all SV violations. NJDEP has agreed to assume full responsibility for gathering and entering information into the database utilizing its own staff.

ADDRESSING SV VIOLATIONS

Establishing Day Zero

The SV/T&A policy states that the clock starts no later than 30 days after finding agency first receives information regarding a SV violation unless the finding agency needs additional time to determine whether the facility is in compliance. The policy then grants up to an additional 60 days to determine compliance status. NJDEP needed additional time for 20 of the 57 SV violations or 35.0% EPA urges NJDEP to develop the capacity to make compliance determinations in an expeditious fashion. When additional time is needed, EPA recommends that NJDEP briefly note the circumstances surrounding the violation in the file to document the need for additional time.

Stack Test Results

NJDEP has agreed to continue to implement the refinements made to the processing of violations discovered during stack tests. As stated in the findings section, NJDEP recognized that the process needed to be streamlined to ensure enforcement takes place in a timely manner and made changes prior to EPA's program review.

Affirmative Defense

For SV violations which involve affirmative defense claims, NJDEP needs to review such affirmative defense claims in an expeditious fashion to ensure SV/T&A Policy time frames are met.

NJDEP contends, that their affirmative defense provisions are derived from the affirmative defense provisions in the federal rules governing the operating permit program. EPA's Timely and Appropriate Policy was issued prior to these federal rules and therefore does not take into account situations where entities assert affirmative defense. When an affirmative defense is asserted, NJDEP indicates it needs additional time to review the circumstances of the violation.

EPA will coordinate with NJDEP to ensure that affirmative defense claims are handled in an expeditious manner and agrees that this situation is not currently discussed in the SV/T&A Policy.

Assessment of Penalties for SV Violations

EPA does not agree that it is appropriate for NJDEP to treat violations that are defined by EPA's SV/T&A Policy as significant, as minor violations under NJ's Fast Track Law. EPA is requesting that NJDEP provide information in order for EPA to determine the appropriate response.

NJDEP contends that they are required by state law to designate certain categories of violations as minor and afford those violators a period of time to comply before a penalty is assessed. NJDEP believes that characterizing minor paperwork violations at major facilities as significant is inconsistent with their state law and disagree with such an approach. Second, NJDEP believes that issuing a Notice of Violation without a penalty for minor violations is appropriate and enables them to maintain a credible deterrent effect. NJDEP has raised concerns that some minor violations are being captured under the SV/T&A policy.

EPA does not agree that the violations in question are minor violations and will work with NJDEP to resolve this issue. NJDEP has agreed that 5 of the 7 violations were significant under EPA's SV/T&A policy. NJDEP also noted that this audit covered the first year of implementing the Fast Track Compliance law. EPA is currently chairing an EPA/State workgroup that is charged with revising the

SV/T&A policy. One of the objectives of the workgroup is to eliminate violations that are not truly significant. EPA Region 2 is an active participant on the and has raised NJ's concerns to the workgroup at large.

The number of SVs identified during the review that were handled under the New Jersey's Fast Track Law (effective 1996) was 7 out of 46 files (15%) reviewed in FY 96. EPA believes this is a significant percentage and that the issue warrants further attention. EPA will review information on violating facilities which meet the Significant Violator definition and are handled under New Jersey's Fast Track Compliance Law at its quarterly meetings with NJDEP for a period of one year. This will allow the Agencies to discuss the specific violations in question and decide upon an appropriate course of action if a conflict with the SV/T&A policy exists. The cumulative information gathered during the year will be used to determine the extent to which the provisions of the Fast Track Compliance Law may or may not be compatible with the SV/T&A policy, and to develop a strategy for resolving any outstanding issues.

FOLLOW- UP ACTIONS

NJDEP ACTIONS -- *Steps taken Prior to EPA's Program Review*

- 1) In SFY 1997, NJDEP conducted a refresher course for their regional supervisors on the requirements of the SV/T&A Policy.
- 2) In SFY 1997, NJDEP created a Workload Analysis Group to identify areas of improvement within NJDEP. One recommendation of the Workload Analysis Group was to decentralize decisions regarding enforcement actions. In the past, all decisions regarding enforcement actions were made by the NJDEP Trenton office. NJDEP believes the decentralization of decision making will improve SV timeliness. NJDEP's goal is to issue an enforcement document within 60 days of receiving information regarding a violation (30 days from the time the clock starts.)

NJDEP ACTIONS - *Other Steps to be Taken by NJDEP*

- 1) NJDEP believes the SV/T&A Policy needs revision. To achieve this, New Jersey is participating in a dialogue between EPA and ECOS to determine what revisions are appropriate to update this guidance document.
- 2) NJDEP has begun operation of a new computer system. The Air Information Management System (AIMS) will allow electronic processing of violation documentation and computer generated enforcement documents. This enhanced processing capacity will improve both document quality and timeliness of issuance.
- 3) As referenced by EPA, NJDEP plans decentralization of enforcement document issuance. This effort, along with the use of AIMS will further enhance the potential for expeditiously addressing SV violations.

NEXT STEPS

- 1) EPA Region 2 will work with NJDEP to ensure that NJDEP, reports and enters SV violation information into the AIRS database.
- 2) EPA Region 2 will continue to meet with NJDEP on a quarterly basis to discuss compliance efforts and to discuss the status of SV enforcement actions pending or in progress.
- 3) EPA is committed to working with NJDEP to ensure the adoption of its Fast Track Regulations is consistent with EPA's SV/T&A policy. EPA is in the process of discussing with NJDEP, the adoption of NJ's Fast Track Regulations. EPA is committed to ensuring Fast Track implementation is consistent with EPA's SV/T&A policy. EPA will work with NJDEP to obtain information on SVs which may fall under the purview of NJ's Fast Track Compliance Law in the future to determine the appropriate response.

Random Selection of Files

Administrative Orders SFY 1995 - Selected from NJDEP's list of all Administrative Orders issued by NJDEP in SFY 1995

Metro--

Started with the 5th AO issued by the Metro Field Office and selected every 5th AO

Southern

Selected 3 AOs and Skipped 1

Notices of Violation SFY 1996 - Selected from NJDEP's file of NOV's issued in SFY 1996

Metro

Started with the 6th NOV's and selected every NOV

Southern

Started with first NOV and Selected every 4th NOV

Majors Inspected - Selected from a NJDEP's list of all majors inspected

Metro

Selected every 18, 36, 54 and 72 inspection listed for SFY 1995

Selected every 18,36, 54 and 72 inspection listed for SFY 1996

Southern

Selected 18 & 36 inspection listed for SFY 1995

Selected 18 & 36 inspection listed for SFY 1996

Minors Inspected - Selected from NJDEP's list of all minors inspected

Metro

Selected every 18, 36, 54 and 72 inspection listed for SFY 1995

Selected every 18,36, 54 and 72 inspection listed for SFY 1996

Southern

Selected 18 & 36 inspection listed for SFY 1995

Selected 18 & 36 inspection listed for SFY 1996